

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
ROBERT J. TOLCHIN)	FOIA Control No. 2003-255
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 2004

Released: March 23, 2004

By the Commission:

1. This order denies an application for review filed by Robert Tolchin (Tolchin) of the law firm Jaroslawicz & Jaros, seeking review of a decision of the Enforcement Bureau (EB) denying in part Tolchin's Freedom of Information Act (FOIA) request.

I. Background

2. Tolchin's FOIA request sought information relating to a Notice of Apparent Liability for Forfeiture (NAL) issued against ASC Telecom, Inc. (ASC), in which the Commission found that ASC apparently violated the Commission's operator service provider rules. See ASC Telecom, Inc., 17 FCC Rcd 18654 (2002), corrected, 17 FCC Rcd 23984 (2002) (NAL). The Commission found that ACS failed to identify itself or provide rate information to consumers who had misdialed a long distance access code and reached ASC on a number similar to the misdialed number. The Commission specified a forfeiture of \$1,440,000. Tolchin's FOIA request sought copies of "whatever materials that have been submitted to the Commission by ASC in opposition or response to the NAL, as well as any subsequent order or determination by the Commission in this matter."¹

3. ASC opposed disclosure of the requested material, claiming that it contained confidential commercial and financial information.² ASC observed that Tolchin's law firm, Jaroslawicz & Jaros, represent Joel Z. Drizen, the plaintiff in a private legal action against ASC,³ and that Drizen received most of the material requested during the suit subject to a protective order.

4. In response to the FOIA request, EB disclosed a list of civil lawsuits pending against

¹ Letter from Robert J. Tolchin to John Rogovin, Esq., General Counsel, Federal Communications Commission (Mar. 12, 2003). This letter supplemented and clarified a previous FOIA request filed October 10, 2002.

² E-mail from Sue D. Blumenfeld to Kurt A. Schroeder, Deputy Chief, Telecommunications Consumer Division, Enforcement Bureau (Apr. 1, 2003).

³ Drizen v. ASC Telecom, Case No. 101707/02 (Sup. Ct. N.Y.).

ASC but withheld all other relevant documents.⁴ EB explained that the withheld material was exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4), which permits nondisclosure of “trade secrets, and commercial or financial information obtained from a person and privileged or confidential.” Additionally, EB stated that Section 222 of the Communications Act, 47 U.S.C. § 222 (“Privacy of Customer Information”), obligates carriers to protect the confidentiality of certain of the information, which, according to EB, made it inappropriate for the government to release it.

II. APPLICATION FOR REVIEW

Tolchin’s application for review contends that the records are not covered by FOIA Exemption 4 because ASC cannot possibly suffer competitive harm as a result of the disclosure of information relating to business activities that ASC no longer engages in.⁵ In this regard, Tolchin relies on testimony in the Drizen case indicating that ASC no longer engages in the business that resulted in the NAL. ASC responds that Tolchin mischaracterizes the significance of the cited testimony.⁶ According to ASC, it no longer engages in the specific activity pertinent to the NAL, namely providing operator services to customers owning misdialed numbers (“fat-finger dial around”). However, ASC represents that it continues to engage in the more general activity of providing operator services and continues to face intense competition; thus, the basis for claiming confidentiality still exists.

III. DISCUSSION

5. On review, we find no reason to disturb the Bureau’s decision. In applying Exemption 4, we examine whether disclosure would likely either “(1) to impair the Government’s ability to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871, 878 (D.C. Cir. 1992). As to the second prong of the test, situations may arise in which information deemed subject to Exemption 4 might be disclosed upon a showing that changed circumstances have removed the threat of competitive harm. See Shermco Industries, Inc. v. Secretary of the Air Force, 613 F.2d 1314, 1317-18 (5th Cir. 1980).

6. Tolchin alleges that this is the case here with respect to documents concerning ASC’s terminated “fat-finger dial around” business. In Tolchin’s view, a distinction can be made between documents pertaining to business in which ASC continues to engage and activities that ASC has discontinued.⁷ Tolchin asserts that documents pertaining to the latter can be itemized and that they should be disclosed.

⁴ Letter from Kurt A. Schroeder, Deputy chief, Telecommunications Consumer Division, Enforcement Bureau to Robert J. Tolchin, Esq. (Jul. 11, 2003).

⁵ Letter from Robert A. Tolchin [sic] to the Office of General Counsel, Federal Communications Commission (Jul. 16, 2003).

⁶ Letter from Robert Millar to John A. Rogovin, General Counsel (Jul. 30, 2003).

⁷ Letter from Robert J. Tolchin to John A. Rogovin, General Counsel (Aug. 5, 2003).

We have, however, examined the material in question, and we agree with ASC that it is not practical to separate documents that relate solely to discontinued aspects of ASC's operator services business and those that continue to pose a threat of competitive harm. Even those documents most directly concerned with "fat-finger dial around" may well disclose business relationships and practices that implicate ACS's more general operator services business. Moreover, some of the information, such as customer proprietary network information (CPNI), covered by Section 222, implicates confidentiality concerns relating to entities other than ASC itself, such as telecommunications carriers, equipment manufacturers, and customers. The need to protect the confidentiality of information regarding these other entities remains regardless of whether ASC currently engages in a particular business activity.

7. Accordingly, IT IS ORDERED that Robert J. Tolchin's application for review is DENIED. Tolchin may seek judicial review of the denial in part of his FOIA request pursuant to 5 U.S.C. § 552(a)(4)(B).

8. The following officials are responsible for this action: Chairman Powell, Commissioners Abernathy, Copps, Martin, and Adelstein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary